STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. L-12/10-635
	)	
Appeal of	)	

INTRODUCTION

The petitioner appeals the decision by the Department of Disabilities, Aging and Independent Living (DAIL) finding her no longer clinically eligible for the Choices for Care (CFC) program. The issue is whether DAIL has met its burden of proof to justify the termination of the petitioner's eligibility.

The petitioner's appeal stems from a Notice of Termination sent by DAIL to the petitioner on October 7, 2010. Following a review hearing held on October 25, 2010, the Department upheld its decision in a Commissioner's Decision dated November 5, 2010. The petitioner appealed this decision to the Human Services Board on December 13, 2010. Following several telephone status conferences (during which time the petitioner obtained the representation of Vermont Legal Aid, and the parties produced and exchanged written materials) a hearing in the matter was held in Brattleboro, Vermont on April 20, 2011.

The testimony at that hearing, which consumed all the time that had been allotted that day,[1] consisted of the Department's two witnesses (two assessors who had evaluated the petitioner for purposes of ongoing eligibility in 2010) and the petitioner's present primary doctor (whose testimony was taken by phone out of turn based on the parties' agreement). At the end of the testimony that day the Department indicated it had rested its case. Prior to rescheduling the hearing for the testimony of the petitioner's remaining witnesses (which included the petitioner herself and her caregiver) the hearing officer directed the Department to file a legal memorandum as to why a ruling should not be made in the petitioner's favor based solely on the evidence taken that day.

The petitioner filed a Motion for Summary Judgment, which was received by the Board on August 9, 2011. The Department filed a written response on August 22, 2011. The petitioner has continued to receive CFC benefits pending the outcome of her appeal.

The following findings of fact are based on the testimony taken at the hearing on April 20, 2011 and on the

[1] The allotment of hearing time had been based on the representations and estimates of the parties' attorneys.

written exhibits and arguments filed by the parties at and subsequent to that hearing.

FINDINGS OF FACT

1. Petitioner is a fifty-year-old woman who has been diagnosed with myriad conditions including fibromyalgia, depression and anxiety. She began receiving in-home personal care services under the Vermont Home and Community Based Services (HCBS) Medicaid Waiver program in 2003. HCBS was the predecessor of the CFC program.

2. Beginning in 2005, the petitioner was assessed for and received personal care services under the CFC program. It appears from Department records supplied by the petitioner that for each year of her CFC eligibility from 2005 through 2008 the petitioner received 50.5 hours of in-home services every two weeks.

3. Also based on Department records supplied by the petitioner, it appears that in October 2009 her personal care hours were reduced to 46.5 hours every 2 weeks. The

petitioner did not appeal this decision, and that reduction is not at issue herein.[2]

4. In most cases "assessments" for CFC services are performed by "case managers" who are usually registered nurses employed by a local home health agency (usually Visiting Nurses) contracting with DAIL. The petitioner has had the same case manager since 2005. Usually, DAIL's annual reassessments for CFC are done in the recipient's home based on the case manager's personal interviews with the recipient, family members, and caregivers, and on any personal observations by the case manager at the time of the assessment.

5. On September 27, 2010, the petitioner's case manger conducted another annual assessment of the petitioner. As in previous years, the 2010 reassessment consisted largely of the case manager's interview in the petitioner's home with the petitioner and her personal care attendant. The case manager testified that she tries to get a "snapshot" of her clients' need for services "over the last seven days", and conducts her assessments accordingly.

[2] The petitioner notes, however, that the Department based its 4 hour biweekly reduction in services on the fact that there were other caregivers present in the petitioner's home, rather than on any finding that her condition or her ability to perform activities of daily living on her own had improved.

6. At the close of her visit on September 27, the case manager orally informed the petitioner that she most likely would be receiving a reduction in PCS hours. The petitioner was extremely upset at this news.

7. The case manager later determined that the petitioner's PCS hours should be reduced from 46.5 to 26 hours every two weeks, although it is not clear whether this determination was communicated directly to the petitioner at that time. The case manager then forwarded her assessment to the Department's Long Term Care Community Coordinator (LTCCC), whose job it is to review the assessment, make a determination as to level of services, and communicate that decision to the recipient.

8. When the LTCCC (also an R.N.) reviewed the case manager's assessment, she determined that the petitioner no longer met the eligibility criteria for the CFC program, and that the petitioner was no longer eligible to receive *any* CFC services. However, inasmuch as the LTCCC had never met the petitioner, she decided to visit the petitioner herself with the case manager before making a final decision.

9. The LTCCC and the case manager visited the petitioner in her home on October 5, 2010, and the LTCCC conducted her own "clinical assessment" of eligibility at

that time. Again, the assessment was based mostly on the petitioner's oral responses to questions posed by the assessor and whether those responses were consistent with the general observations of the assessor during the interview. Based on the LTCCC's assessment, the Department informed the petitioner, in a notice dated October 7, 2010, that she no longer met the "clinical eligibility criteria to participate in the (CFC) program". As noted above, this appeal ensued.

10. At the hearing, both the case manager and the LTCCC testified that they do not conduct direct observations or assessments of a recipient's abilities to perform activities of daily living (ADLs).[3] Instead, they rely almost entirely on a recipient's self reporting during the interview process as to his or her abilities to perform those various activities. Both of the witnesses testified that this is what had occurred during both of their respective interviews with the petitioner in 2010. They further testified that they did not consider any of the petitioner's responses inconsistent with their observations of the petitioner's physical presentation and demeanor during those interviews.

[3] ADLs include dressing, bathing, personal hygiene, bed mobility, toilet use, adaptive devices, transferring, mobility, and eating.

11. At the hearing the case manager testified that she felt that all her previous assessments of the petitioner, from 2005 through 2009 had been accurate, based on the petitioner's statements at her yearly interviews and on the case manager's observations and impressions of the petitioner during those interviews.

12. The case manager admitted that she did not solicit, nor was she aware of, any medical evidence that any of the petitioner's medical problems had improved since October 2009, when based on her assessment the petitioner had been found clinically eligible for CFC services of 46.5 hours every two weeks.

13. The case manager admitted that she did not personally observe or note anything in the petitioner's appearance, physical presentation, or demeanor in 2010 that led her to conclude, herself, that the petitioner's condition had improved.

14. As noted above, prior to October 2010 the LTCCC had never met the petitioner (although it appears she had reviewed and approved the case manager's determinations of the petitioner's eligibility and level of service need on an annual basis since at least 2005). At the hearing, the LTCCC testified that based on her interview with and observations

of the petitioner in October 2010, she "assumed" that the petitioner's condition must have improved since 2009. She admitted, however, that she also did not solicit, nor was she aware of, any medical evidence that this had been the case.

15. Based on the case manager's and the LTCCC's testimony that the petitioner's self reports and all the Department's annual determinations from 2003 through 2008 had been accurate and correct, the inescapable conclusion is that at the time of the petitioner's most recent assessments in September and October 2010, *either* the petitioner's medical condition had, in fact, improved dramatically since 2009 (reducing her need for assistance with ADLs to the point of eliminating her eligibility for CFC) *or* that the petitioner had significantly misreported her actual need for assistance with ADLs when she was interviewed in 2010 (and the Department thus unduly relied on those reports in finding her ineligible). Although being given literally months in which to do so, both before and after the hearing, the Department has not advanced any other possible "theory' for this case.

16. As noted above, the petitioner's primary treating doctor testified at the hearing. Although she had only been treating the petitioner since August 2010, she had taken over the petitioner's treatment from an associate in her practice

who had been treating the petitioner for years. She testified that she had consulted with the petitioner's previous doctor, and that she was familiar with that doctor's treatment record and with the petitioner's medical file, which she referred to in her testimony.

17. The doctor's testimony was that the petitioner's medical condition and any resulting need she has for assistance in performing ADLs have not changed over the past several years. She stated that the primary treatment for the petitioner's condition is medication, and that the side effects of these medications include sedation, which further detracts from the petitioner's physical abilities to perform ADLs. She described the petitioner's overall medical condition as "stable".

18. The doctor admitted that she did not know the level of personal care services the petitioner receives through CFC, but she stated that her assessments of the petitioner's present functioning and prognosis were based on *whatever* level of personal assistance with ADLs the petitioner has, in fact, been receiving over the years. She specifically opined that the petitioner's condition would worsen if she had to try to perform those ADLs herself, without or with reduced help.

19. The Department has not challenged the accuracy or credibility of the doctor's testimony. The doctor admitted that she was unaware if assistance with ADLs might be available to the petitioner through programs or resources other than CFC. However, in light of the lack of any evidence as to the petitioner's improvement, this would only be relevant if the petitioner had also been ineligible for CFC in previous years, something the Department, through its witnesses, specifically denies was the case.

20 Based on the foregoing it is found:

a. that there is no dispute that the petitioner was in fact eligible for all the services she received through CFC (and its precursor) from 2003 through 2009;

b. that there is no credible evidence that the petitioner's condition and subsequent need for assistance with ADLs had in any way diminished or been eliminated when she was assessed in 2010; and

c. that as a result the Department has not met its factual burden of proof that the petitioner was ineligible for CFC in 2010; or that, if she was eligible, there would be

any credible factual basis to reduce the level of those services from those approved in 2009.[4]

ORDER

DAIL's decision to terminate the petitioner's eligibility for Choices for Care is reversed.

REASONS

The petitioner has received personal care services through DAIL since 2003. In 2005, she was "grandfathered" into the CFC program. When the petitioner first received services through the HCBS waiver in 1993, and every year since then through 2009, DAIL made a specific determination that petitioner needed nursing home level care. Since 2005 the petitioner has been an eligible participant in the CFC program, and her eligibility and service needs under that

[4] At the close of the Department's case at the hearing on April 20, 2011 the petitioner represented that she is prepared to present the additional testimony of herself, family members, and her caregiver that her condition and her need for assistance with ADLs has not improved at all since 2009. She further represented that her witnesses would also testify that her 2010 statements to her case manager and the LTCCC, to the extent they may have been inconsistent with her self-reports from past years, were overly prideful and based on periodic fluctuations in the severity of her symptoms and how she may have been feeling on those particular days. The Department (which, as noted above, had at that time already rested its case) has not given any indication that it has any evidence that might rebut such testimony, either through cross examination or rebuttal witnesses. Therefore, in light of the above findings regarding the testimony of those witnesses who did testify at the hearing, the Board need not consider the above representations of the petitioner or take any further testimony in the matter.

program have been reviewed annually through that program's reassessment process.

Under the CFC program, DAIL uses a LTCCC to review its case managers' assessments, and to make final decisions annually regarding eligibility and service need. In this case, the same case manager has conducted all of DAIL's annual assessments of the petitioner since 2005. It also appears that the same LTCCC has reviewed those assessments for all or most of those years. This case stems from DAIL's 2010 reassessment of the petitioner.

In Fair Hearing No. 20,711, as well as in several other cases both before and after that decision, the Board set out in detail that DAIL has the burden of proof in reducing or terminating CFC benefits. See Human Services Board Rule No. 1000.3O(4). The Supreme Court has unequivocally affirmed that standard. *In re Marcella Ryan*, 2008 VT 93.

In this case DAIL provided no credible evidence that petitioner's underlying medical condition and resulting functional abilities had improved when she was reassessed in 2010. To the contrary, as noted above, the evidence overwhelmingly establishes that there has *not* been significant change in her condition or service need for several years, and specifically none between 2009 and 2010.

Thus, there is no basis for finding a change to petitioner's circumstances that would support a change either in her eligibility for CFC or in the level of services she receives under that program.

The question then is whether DAIL has shown any other justification either to terminate the petitioner's eligibility or reduce her benefits. DAIL points to the case of *Husrefovich v. Dept. of Aging and Independent Living*, 2006 VT 17, for support. However, the *Husrefovich* decision stands only for the proposition, not at issue here, that the amount of a recipient's personal care service hours must be warranted by her medical condition, and that those service hours will not be continued unless a recipient continues to demonstrate an actual need for the same level of services. It is crucial to note that in that case the Department had conceded at the outset that it had applied an incorrect standard of assessment for that petitioner in past years. In this case, the Department's witnesses specifically testified that all their previous assessments and decisions, including the one in 2009, had been accurate and legally correct.

As has unfortunately been the case in other cases, including some since *Ryan*, DAIL continues to fail to comprehend the significance of having the burden of proof in

demonstrating that a petitioner is no longer eligible for services or that her services should be reduced. When, as here, there is compelling evidence to the contrary, DAIL cannot sustain its decision solely on what an individual recipient might have told an assessor in one or two interviews. In this case, DAIL had found the petitioner eligible for services in 2009 and had granted her 46.5 personal care services hours every two weeks (which was only a slight reduction in what she had received for the previous several years). The petitioner has alleged from the outset, and has now proven through unrebutted expert testimony, that her underlying medical condition and resulting functional limitations had *not* changed when she was reassessed in 2010.

Thus, it must be concluded that DAIL has failed to demonstrate that there was any credible factual or legal basis to either terminate the petitioner's eligibility for CFC or reduce the level of her services under that program in 2010. Accordingly, DAIL's decision in this matter must be reversed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 17.

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